No. 15,148

In the

United States Court of Appeals

For the Ninth Circuit

SWITCHMEN'S UNION OF NORTH AMERICA, GENERAL ADJUSTMENT COMMITTEE—SOUTHERN PACIFIC COMPANY, SWITCHMEN'S UNION OF NORTH AMERICA; NEIL T. SPEIRS, as International Vice President, Switchmen's Union of North America, and JOHN R. BURGE as General Chairman and as Acting General Chairman, Switchmen's Union of North America,

Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corporation, and BROTHERHOOD OF RAILROAD TRAINMEN, et al.,

Appellees.

Petition for Rehearing of Appellee Southern Pacific Company

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To the United States Court of Appeals for the Ninth Circuit and the Honorable Judges Thereof:

STATEMENT OF GROUNDS FOR REHEARING

Southern Pacific Company, appellee in captioned cause, presents this its petition for rehearing based upon the following grounds:

1. The Court has not considered and applied Section 2 Fourth of the Railway Labor Act;
2. This Court has not considered and applied Section 2 Tenth of the Railway Labor Act;
3. This Court has not considered and applied the case of *Virginian Railway v. Federation,* 300 U.S. 515 (1937);
4. A rehearing should be granted because appellee Switchmen's Union of North America should also be given the right to join additional parties; and
5. A rehearing should be granted because no oral arguments have been presented on the question of jurisdiction.

ARGUMENT AND AUTHORITIES

This Court has rendered an opinion holding that it has no jurisdiction because there is no actual controversy existing between the Switchmen's Union of North America and either the Brotherhood of Railroad Trainmen or the Southern Pacific Company. Appellee Southern Pacific Company submits that a rehearing should be granted in this case for the reasons set forth in this petition.

I. The Decision of This Court Dismissing for Lack of Jurisdiction Should Be Reconsidered Because of its Inconsistency with Section 2 Fourth of the Railway Labor Act and Decisions of the United States Supreme Court in Such Cases as Virginian Ry. v. Federation, 300 U.S. 515 (1937).

An examination of the opinion of the Court in this case clearly discloses that the Court has not considered the nature of the right claimed by the Switchmen's Union of North America (hereinafter referred to as Switchmen's Union) and that the source of that right is Section 2 Fourth rather than Section 2 Eleventh of the Railway Labor Act. The opinion cites and relies only upon Section 2 Eleventh

of the Railway Labor Act (45 U.S.C. § 152 Eleventh). It fails to take any note of Section 2 Fourth (45 U.S.C. § 152 Fourth).

This case is concerned primarily with whether or not the dues deduction agreements involved come within the purview of Section 2 Eleventh. Therefore, the previous arguments of the parties in this case have been directed to the problem of how Section 2 Eleventh is to be interpreted. However, Section 2 Eleventh gives the Switchmen's Union no rights and, by itself, creates no controversy between the parties for the purposes of Federal Court jurisdiction even if the Switchmen's Union's contention concerning Section 2 Eleventh is sustained. Any rights which the Switchmen's Union may have are based not upon Section 2 Eleventh but upon Section 2 Fourth of the Railway Labor Act, which this Court has overlooked and failed to consider.

The failure of the Court to consider the effect of Section 2 Fourth is undoubtedly due to the fact that if it is held that the dues deduction agreements do not come within the exemption of Section 2 Eleventh, the rights guaranteed to Swichmen's Union by Section 2 Fourth arise automatically. Therefore, the parties have previously had no occasion or reason to present arguments concerning the interpretation or operation of Section 2 Fourth, which is a compelling reason for this Court to grant a rehearing.

Although the opinion of the Court is not clear on the point, it is apparently the position of the Court that it has no jurisdiction in this case for the simple reason that the Switchmen's Union is not a party to the alleged illegal dues deduction agreements and therefore has no rights accorded to it under Section 2 Eleventh of the Railway Labor Act. If this is the position of the Court, it is very clear that the Court not only has overlooked the very nature and purpose

of a declaratory judgment but also has not applied Section 2 Fourth of the Railway Labor Act, the pertinent portion of which accords rights to labor unions and representatives rather than individual employees.

Section 2 Eleventh of the Railway Labor Act permits dues deduction agreements to be made *under certain circumstances,* and exempts such agreements from the prohibition contained in Section 2 Fourth. However, if the exemption of Section 2 Eleventh does not apply, then such agreements automatically become illegal under Section 2 Fourth. Thus, the outcome of this case, when decided upon its merits, depends upon the interpretation given to Section 2 Eleventh, and the previous arguments of the parties have been directed almost solely to that question. However, if the contention of the Switchmen's Union that the dues deduction agreements involved here are not exempt under Section 2 Eleventh is sustained, the right of the Union to obtain relief and the jurisdiction of this Court to grant such relief derive not from Section 2 Eleventh, but instead from Section 2 Fourth. Thus, it becomes clear that there is an actual controversy present in this case as to whether rights guaranteed to the Switchmen's Union are being violated by Southern Pacific Company, and the Court does have jurisdiction to render a decision upon the merits in this case. In effect, Section 2 Eleventh constitutes a matter of defense on the part of Southern Pacific Company. It is Section 2 Fourth which accords rights to the Switchmen's Union.

That Section 2 Fourth of the Railway Labor Act accords rights to unions rather than individual employees is readily seen from an examination of the statute itself. Every single prohibition contained in Section 2 Fourth is designed to insure that employees will be free to join the union of their choice and to change unions. In the very words of the statute, the prohibitions against carriers are designed to pre-

vent the carrier from influencing or coercing "employees in an effort to induce them to join *or remain* or not to join or remain members of any labor organization." The statute clearly shows that the purpose of the prohibition against dues deduction agreements is *to prevent the carrier from assisting any particular organization in its efforts to remain in power.* The obvious beneficiary of the benefits bestowed by this section, and the party to which Congress clearly intended to accord rights, is the organization which may be trying to persuade employees to change their union affiliation.

Moreover, under the rule of *Virginian Ry. v. Federation,* 300 U.S. 515 (1937), the Switchmen's Union is entitled to injunctive relief to enforce rights accorded to it by Section 2 Fourth of the Railway Labor Act. Therefore, Southern Pacific Company respectfully submits that a rehearing should be granted in this case not only because the Court has not referred to or applied the language of Section 2 Fourth but because its decision is contrary to the decision of the United States Supreme Court in *Virginian Ry. v. Federation,* 300 U.S. 515 (1937).

Since, as has been seen, this case involves an alleged violation of rights which are clearly guaranteed to the Switchmen's Union by Section 2 Fourth of the Railway Labor Act and such rights may be enforced by injunction under the rule of *Virginian Ry. v. Federation,* 300 U.S. 515 (1937), it is clear that this is a proper case for a declaratory judgment over which the Court has jurisdiction.

An acknowledged authority on the law of declaratory judgments has pointed out that this is exactly the type of situation which is the proper subject of an action for declaratory judgment. Thus, it is stated in Borchard, *Declaratory Judgments* (2d ed.), pp. 505-06:

"Parties to contracts, faced by the claim of a co-contractor *or qualified third party* that the contract is invalid and not binding on the defendant, and placed thereby in danger or fear of loss or prejudice, may resort to a declaratory action to sustain the validity and binding nature of the contract and thus relieve their insecurity. The defendant's claim of invalidity may precede or follow a purported breach or may consist simply in a challenge of the plaintiff's rights, which the declaration is designed to re-establish and assure against similar attack. The challenge may be directed to the plaintiff's power to enter into the contract, an issue which ought to be settled before a legal structure has been built upon it. It may be directed to the form or substance of the contract, relying in turn upon statute or will or other source to justify the invalidity." (Emphasis added.)

In addition, Borchard goes on to state (p. 509):

"The contesting defendant may be a private person affected in some way by a contract already made or about to be made by the plaintiff. Asserting that the contract, executed or proposed, is invalid, he affords the plaintiff a sound motive for seeking judicial protection against the charge of illegality or the danger of outside interference by removing through a declaratory judgment the cloud cast upon his rights by the charge or claim."

No language could be any more applicable to the case at bar.

II. A Rehearing Should Be Granted in This Case Because, Since the Switchmen's Union has a Vital Interest in the Determination of this Legal Question, it Should Also Be Given the Right to Join Individual Employees if That Is Necessary for this Court to Acquire Jurisdiction.

It has already been demonstrated that the Switchmen's Union has just as great an interest in the question presented by the case at bar as any of the other parties. However, the only party to which the Court has given leave to add an individual as a party is the appellee Southern Pacific Company. Therefore, an additional reason why a rehearing should be granted in this case is that the Switchmen's Union should also be given the right to join individual employees as parties if that is necessary to acquire jurisdiction.

III. This Court Did Not Affirm or Deny the Action of the District Court Which Denied the Switchmen's Union's Counterclaim for Injunctive Relief. If the Dues Deduction Agreements Involved in This Case Are Not Permitted by Congress in Section 2 Eleventh of the Railway Labor Act, the Switchmen's Union Is Entitled to an Injunction.

If the Court has based its holding that it has no jurisdiction upon the ground that the Switchmen's Union is not entitled to an injunction even if Sections 2 Fourth and 2 Eleventh provide that a dues deduction agreement is illegal when entered into by an employee of one union who is working at a job for which another union is the bargaining agent, the decision is contrary to the decision of the United States Supreme Court in *Virginian Ry. v. Federation,* 300 U.S. 515 (1937), which the Court has not taken note of in its opinion.

It should be noted that the Court, in dismissing for lack of jurisdiction, has treated this case solely as an action for a declaratory judgment. Thus, the decision overlooks the fact that the Switchmen's Union has counterclaimed for an injunction and the case is no longer only for a declaratory

judgment. The Court has, in effect, held either that the Switchmen's Union has no right to an injunction even in an original action requesting such relief or that, in no event, can the Switchmen's Union have any rights concerning dues deduction agreements under Section 2 Fourth of the Railway Labor Act. This, as we have already shown, overlooks Section 2 Fourth and the decision of the Supreme Court of the United States in *Virginian Ry. v. Federation,* 300 U.S. 515 (1937). In any event, if such a holding is what the Court actually intended, it is respectfully submitted that the parties are, at the very least, entitled to have the Court so state in clear and explicit terms.

The history of the Railway Labor Act was discussed by the United States Supreme Court in *Virginian Ry. v. Federation,* 300 U.S. 515 (1937), as follows (pp. 542-43):

> *"First. The Obligation Imposed by the Statute.* By Title III of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 469, Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought 'to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board * * *' *Pennsylvania R. Co. v. Railroad Labor Board,* 261 U.S. 72, 79. The decisions of the Board were supported by no legal sanctions. The disputants were not 'in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion.' *Pennsylvania Federation v. Pennsylvania R. Co.,* 267 U.S. 203, 216.
>
> "In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their

employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act. Report, Senate Committee on Interstate Commerce, No. 222, 69th Cong., 1st Sess. *Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, supra,* 563. *By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations.*" (Emphasis added.)

The *Virginian Ry.* case concerned the obligation of an employer to "treat with" a union. It held that this was a mandatory obligation capable of being enforced by injunction. The following language of the Supreme Court in the *Virginian Ry.* case demonstrates, beyond any reasonable doubt, that the dues deduction prohibition of Section 2 Fourth also falls within the class of obligations which are enforceable by injunction. The Supreme Court stated (p. 545):

"It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. The policy of the Transportation Act of encouraging voluntary adjustment of labor disputes, made manifest by those provisions of the Act which clearly contemplated the moral force of public opinion as affording its ultimate sanction, was, as we have seen, abandoned by the enactment of the Railway Labor Act. Neither the purposes of the later Act, as amended, nor its provisions when read, as they must be, in the light of our decision in the *Railway Clerks* case, *supra,* lend support to the contention that its enactments, which are mandatory in form and

capable of enforcement by judicial process, were intended to be without legal sanction.[3]"

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[3]The 1934 amendment imposed various other obligations upon the carrier, to which criminal penalties were attached [§ 2 Tenth]—e.g., *prohibitions against helping unions, by contributions of funds, or assistance in the collection of dues, § 2, Fourth;* * * * (Emphasis added.)

The footnote by the Supreme Court, quoted above, shows that it could not be more obvious that the right of one union organization, if such right exists, not to have employees enter into dues deduction agreements favoring another union, is one which the Switchmen's Union is entitled to have enforced by injunction in this case as it has requested.

Under such circumstances, it is difficult to conceive of a situation which would more clearly present a case of an "actual controversy" as required by the statute providing for declaratory judgments (28 U.S.C. § 2201). Moreover, it is readily seen that this case falls directly within the purpose and the intent of the declaratory judgment statute.

It has been stated by the courts time and time again that the purpose of the declaratory judgment statute is to allow a dispute to be adjudicated before damage has actually been suffered without waiting for the other party to take the initiative.

King Kup Candies v. H. B. Reese Candy Co., 134 F. Supp. 463 (1955);

Scott-Burr Stores Corp. v. Wilcox, 194 F.2d 989 (1952);

Hardware Mut. Cas. Co. v. Schantz, 178 F.2d 779 (1949);

Delaney v. Carter Oil Co., 174 F.2d 314 (1949), *cert. denied,* 338 U.S. 824;

Dewey & Almy Chemical Co. v. American Anode, 137 F.2d 68 (1943);

Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa, 42 F. Supp. 917 (Idaho 1942);

Employers' Liability Assur. Corp. v. Ryan, 109 F.2d 690 (1940), *cert. dismissed,* 311 U.S. 722 (1940);

Lehigh Coal & Navigation Co. v. Central R.R. of New Jersey, 33 F. Supp. 362 (Pa. 1940).

The record demonstrates that the Switchmen's Union has threatened appellee Southern Pacific Company that it will enforce its alleged rights under Section 2 Fourth and has attempted to do so by demanding an injunction in this case. Beyond a doubt, a controversy exists and this Court has jurisdiction to determine it.

IV. A Rehearing Should Be Granted Because, Although the Court States that its Decision Is Based Upon Jurisdictional Grounds, the Court has Actually Decided the Case Upon the Merits.

As pointed out in the opinion of the Court, there is no controversy between appellee Southern Pacific Company and appellee Brotherhood of Railroad Trainmen for the simple reason that they agree as to the correct interpretation of Section 2 Eleventh of the Railway Labor Act. However, the appellant, Switchmen's Union of North America, has contended that it has a right, *distinct from any right of an individual employee,* to have employees engaged in work in the craft for which the Switchmen's Union is the bargaining agent, free from dues deduction agreements in favor of another union organization. Moreover, the Switchmen's Union correctly contends that this right is guaranteed to it by Section 2 Fourth of the Railway Labor Act if the exemption of Section 2 Eleventh does not apply. Therefore, it is clearly seen that the decision of this Court in stating that it has no jurisdiction is actually holding either that the Switchmen's Union has no such right guaranteed to it by

Section 2 Fourth or that, even if it has such a right, it is a right without a remedy. One ground or the other is implicit in the holding of this Court that it does not have jurisdiction.

At the very least, the parties should be entitled to learn which of these two grounds was relied upon by the Court. However, in either event, the Court's opinion constitutes a decision upon the merits of the case which conflicts with the language of Section 2 Fourth of the Railway Labor Act and the decision of the United States Supreme Court in *Virginian Ry. v. Federation,* 300 U.S. 515 (1937). It decides the very questions which appellee Southern Pacific Company sought to have resolved when it instituted the action for declaratory relief. However, by purportedly resting its decision on jurisdictional grounds, the Court has rendered a decision upon the merits in such a manner that appellee Southern Pacific Company cannot rely upon it in the event that the Switchmen's Union attempts to enforce its alleged statutory rights. Thus, the very purpose of actions for declaratory relief, which is to decide controversies before a party becomes injured, is nullified by the decision since it is clear that the Court necessarily had to come to a decision upon the merits before it could hold that there was no jurisdiction.

V. A Rehearing Should Be Granted in This Case Because the Court Has Not Considered Section 2 Tenth of the Railway Labor Act by Virtue of Which Appellee Southern Pacific Company May Incur Charges Involving Serious Legal Liabilities and Damage.

It has already been pointed out that the Declaratory Judgment Statute, 28 U.S.C. § 2201, is primarily designed to allow a party to have a dispute adjudicated before damage has actually been suffered without waiting for the party

who claims its rights have been violated to take the initiative.

King Kup Candies v. H. B. Reese Candy Co., 134 F. Supp. 463 (Pa. 1955);

Berlitz School of Languages of America v. Donelly & Suess, 84 F. Supp. 75 (Pa. 1949);

Peoples Bank v. Eccles, 64 F. Supp. 811 (1946);

Pacific Fire Ins. Co. v. C. C. Anderson Co. of Nampa, 42 F. Supp. 917 (Idaho 1942);

Employers' Liability Assur. Corp. v. Ryan, 109 F.2d 690 (1940), *cert. dismissed,* 311 U.S. 722 (1940);

Hann v. Venetian Blind Corp., 15 F. Supp. 372 (Cal. 1936).

Under such circumstances, an additional reason why appellee Southern Pacific Company is entitled to institute an action for declaratory judgment in this case is found in Section 2 Tenth of the Railway Labor Act (45 U.S.C. § 152 Tenth) which also has been omitted from consideration by this Court. Section 2 Tenth provides in part as follows:

> "The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, *fourth,* fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. *It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of*

the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof. * * *" (Emphasis added.)

While it is, of course, doubtful that Southern Pacific Company could be convicted of a "willful" failure to comply with Section 2 Fourth, nevertheless the possibility of such an action, even though it would be unlikely to succeed, very definitely exists. Thus, this is exactly the type of case and the type of situation which a declaratory judgment action is designed to remedy and over which the Court has jurisdiction. Therefore, appellee Southern Pacific Company submits that a rehearing should be granted in this case for the additional reason that the Court in denying jurisdiction has not considered Section 2 Tenth of the Railway Labor Act.

VI. A Rehearing Should Be Granted Because the Question of Jurisdiction Has Not Previously Been Fully or Adequately Argued.

Prior to and throughout the oral argument in this case, all of the parties were in agreement that the Court had jurisdiction. The question of jurisdiction was first raised by the Court itself at the time of the oral argument. When the question was raised by the Court, the parties had prepared no oral argument on the point since all parties conceded jurisdiction. Thereafter, the Court requested that supplementary briefs be filed. However, it is submitted that in view of the relatively short time allowed for submission of supplementary written briefs and the complexity of the problem which had not been considered previously, the briefs did not treat the subject as fully and adequately as is desirable for such an important point. Furthermore, the points set out in this petition demonstrate the need for oral

argument upon the question of jurisdiction. Appellee Southern Pacific Company, therefore, submits, that a rehearing is essential to a proper determination of this case and that a rehearing should be granted.

CONCLUSION

The opinion of the Court in this case shows that in deciding that it has no jurisdiction, the Court has relied solely upon Section 2 Eleventh of the Railway Labor Act. The Court has failed to consider and apply Sections 2 Fourth and 2 Tenth of the Railway Labor Act, the decision of the United States Supreme Court in *Virginian Ry. v. Federation,* 300 U.S. 515 (1937), and other cases setting forth the nature and purpose of a declaratory judgment action. The decision of the Court is in conflict with these authorities. Therefore, appellee Southern Pacific Company respectfully submits that a rehearing should be granted in this case.

Respectfully submitted,

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W. A. Gregory
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City and County of
San Francisco, California.

I, W. A. Gregory, hereby certify, in accordance with Rule 23 of Rules for the United States Court of Appeals for the Ninth Circuit, that I am one of the attorneys for appellee Southern Pacific Company; that the Petition of Appellee Southern Pacific Company for rehearing is presented in good faith and is not interposed for delay; and that in my opinion the petition is well founded.

This 13th day of June, 1957.

W. A. Gregory

Attorney for Appellee
Southern Pacific Company.